IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-496

WILLIAM L. CARGILE and THOMAS F. MORGAN,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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ISSUE PRESENTED

WHETHER THE PETITIONERS' ABSENCE FROM AN IN-CHAMBERS INQUIRY INTO POSSIBLE JUROR PREJUDICE VIOLATED THEIR CONSTITUTIONAL RIGHTS SO AS TO REQUIRE THE AUTOMATIC REVERSAL OF THEIR CONVICTIONS, IN SPITE OF THE ABSENCE OF ANY REASONABLE POSSIBILITY OF PREJUDICE.

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COUNTERSTATEMENT OF THE CASE

The Petitioners, William L. Cargile and Thomas F. Morgan and two others were tried in the Recorder's Court for the City of Detroit on one count of first degree murder, two counts of kidnapping and two counts of felonious assault.

At the commencement of the proceedings on the fourth day of trial, November 5, 1971, counsel for Petitioner Morgan made a motion for mistrial based upon possible juror prejudice resulting from the publication of a newspaper article and the broadcast of a televison program the previous day (IV, 378-379)*.

It was argued by defense counsel that the broadcast of this program, containing remarks made by then-Recorder's Court Judge Robert J. Colombo that there had been a breakdown in law enforcement due to the intimidation of witnesses who, as a result of this, recant their testimony, would irrevocably prejudice his client's right to a fair and impartial trial (IV, 379-380).

The trial prosecutor responded by noting that while defense counsel's allegations did raise the possibility of prejudice, such allegations were speculative as to the issue of whether the jury had seen the television program or read the newspaper article (IV, 383).

The prosecutor then suggested that the granting of the motion for mistrial was an inappropriate remedy at this juncture (IV, 383). Placing an alternative recommendation before the court, he urged that a separate voir dire of the jurors be conducted for the purpose of determining whether any of them had seen, heard or read anything about the case or in reference to the criminal justice system and the intimidation of witnesses (IV, 383-384). It was further suggested that the court issue an instruction to the jurors that they avoid the communications media for the duration of the trial, and perhaps order the media to cease its coverage of the trial (IV, 384).

Having considered these alternatives, the court announced its decision to hold an in-chambers voir dire of each juror to determine whether or not they had been influenced by the complained-of media coverage (IV, 385). In addition, the court requested the presence of

* Numerals in parentheses refer to page numbers of trial transcript.

all defense attorneys and the attorney for the People. This procedure was affirmatively agreed to by all parties (IV, 385).

After having concluded the in-chambers inquiry into possible juror prejudice (IV, 386-425), the trial prosecutor sought to determine whether defense counsel now wished to withdraw their motion for mistrial (IV, 426). To this, counsel for both Defendants Morgan and Cargile stated that they did not (IV, 426-427).

The trial prosecutor then renewed his objection to the motion, noting that the voir dire of the jury indicated that only two of its members had heard some of the alleged prejudicial publicity and that both of them stated that it would not influence their deliberations (IV, 427).

Furthermore, as the substance of defense counsels' motion concerned the nature of the publicity and as the two jurors indicated that they had heard something in regard to the burning of the house of a witness in another case, the trial prosecutor requested the court "to exercise its power under statute to excuse those two jurors and thereby cure any possible prejudice that may have arisen with respect to this publicity..." (IV, 428).

Counsel for Defendant Morgan opined that both individuals were necessary jurors; that they heard nothing directly-connected with the present case; and, that as they claimed that they were not influenced by what they did hear, there was no reason to excuse them from the jury (IV, 428-249). Attorneys for the remaining defendants expressed similar views in objecting to the trial prosecutor's suggestion that these two jurors be excused (IV, 429-432).

Having thus considered the arguments of counsel, the trial court denied the motion for mistrial and refused to dismiss any of the jurors at this point of the trial (IV, 432).

While having been acquited of the murder charge, the Petitioners were each convicted of two counts of kidnapping and two counts of felonious assault. Each Petitioner was sentenced to forty to ninety-nine years on each kidnapping conviction and three to four years on each felonious assault conviction.

In their appeal to the Michigan Court of Appeals, the Petitioners contended that their presence was required at an in-chambers conference to determine whether there was improper media influence upon the jurors and that, although their attorneys were present, their absence during the conference denied them their right to a fair trial.

The Court of Appeals held that People v Medcoff, 344 Mich 108; 73 NW2d 537 (1955), requires that the defendants, as well as counsel, be present when a judge questions jurors as to possible prejudice arising from media presentations during the course of the trial. While implying that this required presence is waivable, the court noted that the record was devoid of any indication that the defendants waived their right to be present.

An affidavit was submitted to the Court of Appeals by the prosecutor stating that he had informed all three defense attorneys of the trial court's intention to question each juror in chambers, that he urged each attorney to consult with his respective client, and that each attorney, after having spoken with his client, adivsed the prosecutor that they did not wish to be present. Reply affidavits, submitted by all three defense attorneys, either denied any recollection of such a conversation or denied that such a conversation took place at all.

Being unable to resolve this dispute, the Court of Appeals remanded for an evidentiary hearing to determine if there had been a waiver, stating:

> If it is determined that defendants were advised by their attorneys of their right to be present when the trial judge questioned the jurors, defendants' convictions are affirmed. On the other hand, if the defendants were not so advised by their attorneys, new trials must be ordered.
>
> The cause is remanded to the trial court for proceedings consistent with this opinion.
>
> All concurred. People v Morgan, 50 Mich App 288, 294-295; 213 NW2d 276, 279 (1973).

An evidentiary hearing was held with the trial court ruling that no waiver was shown and that new trials be granted.

Subsequently, the Michigan Supreme Court granted the People's application for leave to appeal. On July 18, 1977 the Michigan Supreme Court reversed the decision of the Court of Appeals and reinstated the Petitioners' convictions. People v Morgan, 400 Mich 527; 255 NW2d 603 (1977). Finding that this Honorable Court has recognized the principle that even violations of constitutional rights can amount to harmless error in the circumstances of a particular case, the Court noted that automatic reversal is not mandated in cases involving a defendant's absence from a part of a trial. Since the proper test for determining whether a defendant's absence from a part of a trial requires reversal of his conviction is whether there is any reasonable possibility of prejudice, the Michigan Supreme Court held that the record in the case at bar revealed that there was no reasonable possibility that the Petitioners were prejudiced by their absence from the questioning of the jurors.

REASON FOR DENYING THE WRIT

ABSENT ANY REASONABLE POSSIBILITY OF PREJUDICE, THE PETITIONERS' ABSENCE FROM AN IN-CHAMBERS INQUIRY INTO POSSIBILE JUROR PREJUDICE DOES NOT VIOLATE THEIR CONSTITUTIONAL RIGHTS SO AS TO REQUIRE THE AUTOMATIC REVERSAL OF THEIR CONVICTIONS.

While the Petitioners readily admit that the absence of a defendant during part of a trial may in some circumstances be harmless error, it is their contention that "...it cannot be said beyond a reasonable doubt that the Defendants here were not prejudiced by the violation of their constitutional right to be present during the questioning and challenging of the jurors." (Petitioner's Brief, p. 12)

The Michigan Court of Appeals based its decision in the instant case on People v Medcoff, 344 Mich 108; 73 NW2d 537 (1955) wherein the Michigan Supreme Court said that once absence is established, "[i]njury is conclusively presumed." 73 NW2d 537, 543. However, the Medcoff Court also emphasized the crucial element of the case which is clearly distinguishable from that of the case at bar; namely, in Medcoff neither the defendants nor their counesl nor the prosecuting attorney were present during the proceeding.

Thus, the Court in Medcoff focused its attention upon a consideration of the defendants' right of trial by jury and their right to be present at such trial. However, nowhere does Medcoff expressly state that the defendant, as well as counsel, must be present at an in-chambers voir dire of jury members. It is only in a quote from Hopt v Utah, 110 US 574; 4 S Ct 202; 28 L Ed 262 (1883) that the Medcoff opinion contains language to

the effect that presence of counsel alone does not meet the necessities of the defense. But, Medcoff points out that later United States Supreme Court cases limit certain statements made in Hopt, 73 NW2d 537, 542. In one of those cases, Howard v Kentucky, 200 US 164; 26 S Ct 189; 50 L Ed 421 (1905), the Court affirmed the defendant's conviction in circumstances very similar to those in the instant case because counsel had agreed to the defendant's absence from the inquiry.

In reinstating the Petitioners' convictions, the Michigan Supreme Court harmonized its earlier decision in Medcoff with the current line of federal authorities [255 NW3d 603, 606 (1977]:

> Although we believe the Medcoff result was correct on its facts, it is no longer the law that injury is conclusively presumed from defendant's every absence during the course of a trial. No less an authority than the United States Supreme Court has recognized that even violations of constitutional rights can amount to harmless error in the circumstances of a particular case,[6] and in cases involving a defendant's absence from a part of a trial, that Court has indicated that automatic reversal is not the rule.[7] Similarly, the recent cases from the Federal Courts of Appeal have rejected a rule of automatic reversal in cases involving a defendant's absence from trial.[8]

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6 See Chapman v California, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967).

7 See Illinois v Allen, 397 US 337; 90 S Ct 1057; 25 L Ed 2d 353 (1970).

8 See Jones v United States, 299 F2d 661 (CA 10, 1962), cert den 371 US 864; 83 S Ct 123; 9 L Ed 2d 101 (1962); Rice v United States, 356 F2d 709 (CA 8, 1966);

Ware v United States, 376 F2d 717 (CA 7, 1967); Wade v United States, 142 US App DC 356; 441 F2d 1046 (1971); Bustamante v Eyman, 456F2d 269 (CA 9, 1972); United States v Toliver, 541 F2d 958 (CA 2, 1976).

Consequently, the Michigan Supreme Court rejected the "conclusively presumed injury" principle and adopted

> ...the following language from Wade v United States, 142 US App DC 356, 360; 441 F2d 1046, 1050 (1971), as the proper test for determining whether a defendant's absence from a part of a trial requires reversal of his or her conviction:
>
> > "It is possible that defendant's absence made no difference in the result reached. The standard by which to determine whether reversible error occurred [is] * * * whether there is 'any reasonable possibility of prejudice'. "
>
> 255 NW2d 603, 606 (1977)

By applying the Wade standard, the Michigan Supreme Court found that the record revealed no reasonable possibility that the Petitioners were prejudiced by their absence during the questioning of the jurors. The transcript of the proceedings dealing with this inquiry reveals that none of the jurors saw the newspaper articles relative to the case and that only two of the fourteen jurors witnesses the questioned porion of a television program which dealt not with this case but with a problem in Recorder's Court in general (IV, 378-434). The transcript further discloses that those two jurors would not have been influenced in their deliberations by the program (IV, 397-399; 402-406; 427).

Noting that the substance of the defense motion for mistrial concerned the nature of the publicity and as two of the fourteen jurors indicated that they had observed part of television program which dealt with the burning of the house of a witness in an unrelated case, the prosecutor importuned the trial court to exercise its statutory power to excuse those two witnesses and thus cure any possible prejudice which may have arisen due to this publicity (IV, 428). However, this suggestion was met with vigorous opposition by all of the defense attorneys (IV, 428-432). This response from defense counsel demonstrates unequivocally how those two jurors were viewed by the defense in relation to the other twelve jurors. There can be no question that the defense attorneys considered their continued presence vital to a successful representation of their clients' interests and thus reigstered strenous objections to allowing those two jurors to be excused from deliberations. They made it as clear as possible that they did not see any prejudice in letting those two jurors deliberate. By the same token, the record reveals no basis whatsoever for excusing any of the other twelve.

Consequently, the decision of the Michigan Supreme Court which has adopted the standard enunciated in Wade and which has been consistently followed by the federal appellate courts should be upheld.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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